**UNITED STATES OF AMERICA**
**BEFORE THE NATIONAL LABOR RELATIONS BOARD**
**REGION 1 - SUBREGION 34**

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| CHIP'S WETHERSFIELD, LLC D/B/A CHIP'S FAMILY RESTAURANT<br><br>and<br><br>JACQUELINE RODRIGUEZ,<br>AN INDIVIDUAL | CASE 01-CA-217597<br><br><br><br>JANUARY 18, 2019 |

**POST-HEARING BRIEF OF CHIP'S WETHERSFIELD, LLC**


CHIP'S WETHERSFIELD, LLC D/B/A
CHIP'S FAMILY RESTAURANT

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## I. INTRODUCTION

On April 2, 2018, Jacqueline Rodriguez (hereinafter, "Rodriguez") filed a charge with the National Labor Relations Board (hereinafter, the "Board"). Rodriguez, as an individual, charged Chip's Wethersfield, LLC d/b/a Chip's Family Restaurant (hereinafter, "Chip's") as follows: "[o]n about October 8, 2017, [Chip's] terminated employee, Jacqueline Rodriguez, for engaging in protected activities ***by speaking up in defense of a co-worker***", or Denise Bachand. *See* Charge Dated April 2, 2018 (emphasis added). On May 24, 2018, Rodriguez filed an amended charge with the Board. In the amended charge, which was served upon Chip's on May 25, 2018, Rodriguez claimed as follows: "Within the six-months preceding the filing of this charge, the Employer has unlawfully restricted employees from discussing work-related incidents with other employees." *See* Charge Dated May 24, 2018.

On July 18, 2018, the Board served the *Complaint and Notice of Hearing* (hereinafter, the "*Complaint*") that was the subject of the hearings held on November 5, 2018 and November 6, 2018. The Board's *Complaint* is expressly premised upon the charge filed by Rodriguez, and asserts that ". . . Respondent has been interfering with, restraining, and coercing its employees in the exercise of the rights guaranteed in Section 7 of the Act in violation of Section 8(a)(1) of the Act." *Complaint*, § 10.

The NLRB relies upon three (3) instances of conduct in order to support its assertion that Chip's engaged in unfair labor practices that violate § 8(a)(1) of the Act. The three instances of conduct are:

- "About October 4, 2017, Respondent, by Cuozzo, in writing, ***prohibited employees*** from discussing work-related incidents with other employees." *Complaint*, § 6 (emphasis added).
- "About October 8, 2017, Respondent ***discharged Rodriguez***." *Complaint*, § 8 (emphasis added).

- "[Chip's] engaged in the conduct described above . . . to discourage employees from engaging in these ***or other*** protected concerted activities."[1] *Complaint*, § 9 (emphasis added)

## II. STATEMENT OF FACTS

Rodriguez was hired by Chip's in or about October of 2014. She worked at the Chip's restaurant in Wethersfield, Connecticut as a server until October 8, 2017. Laura Robertson, General Manager of the Wethersfield, Connecticut location of Chip's, made the decision to terminate Rodriguez' employment because she engaged in insubordinate, hostile and highly disruptive workplace behavior, culminating in an incident on October 2, 2017 (discussed further below). During the October 2, 2017 incident, Rodriguez yelled at Santasha Olden, an assistant manager, in front of or observable to customers and co-workers. This October 2, 2017 incident followed a similar incident on September 18, 2017 (discussed further below) during which Rodriguez yelled at a cook in front of customers and co-workers.[2] Following an investigation into

[1] The *Complaint* specifically alleges as follows: "From about August 2017 through October 5, 2017, Respondent's employee Jacqueline Rodriguez engaged in concerted activities with other employees for the purposes of mutual aid and protection by criticizing Olden's management style and her treatment of a coworker." *Complaint*, § 7.

[2] The following is from the testimony of Ms. Robertson, who conducted the investigation into both incidents. Notably, Ms. Bachand confirmed that Rodriguez yelled at Ms. Olden during the October 2, 2017 incident.

| | | |
|---|---|---|
| 20 | Q. | And why did you recommend Ms. Rodriguez's termination? |
| 21 | A. | Well, as I wrote in this email I just -- I felt like it |
| 22 | | was going to be a continuing issue because of the interview |
| 23 | | that we had with her. It didn't seem that she understood what |
| 24 | | I was saying was wrong. |
| 25 | Q. | Okay. |
| | | |
| 1 | A. | So there were issues with fighting with, you know, other |
| 2 | | staff members and being loud and it just didn't seem like she |
| 3 | | was willing to take my advice to just work with the staff. |
| 4 | Q. | And when you said being loud what did you mean? |

the incident, Ms. Robertson determined that Rodriguez was unapologetic in her repeated refusal to follow those Chip's' policies and procedures with which she disagreed.[3] Ms. Robertson also determined that Rodriguez' conduct and attitude was negatively affecting Chip's' business. In making these determinations, Ms. Robertson interviewed Rodriguez and Denise Bachand, obtained a written statement from Ms. Olden and reviewed Rodriguez' previous history of insubordinate workplace conduct.[4] *See* Exhibits RX1 to RX7, Warnings to Rodriguez for Insubordination. A delineation of these incidents follows:

- On October 2, 2017, Rodriguez was written up for insubordination by confronting a

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|---|---|---|
| 5 | A. | Well, pertaining to the incident that happened that |
| 6 | | Monday, there was screaming that went on in the restaurant. |
| 7 | Q. | Okay. |
| 8 | A. | And as I mentioned the incident with the cook, there was |
| 9 | | also yelling that happened that day. |
| 10 | Q. | By Ms. Rodriguez? |
| 11 | A. | Yes. |

*See* November 6, 2018 Transcript, pg. 188, lines 20 – 25; pg. 189, lines 1 – 11.

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| 9 | Q. | So as it relates to the incident on October 2nd and the |
| 10 | | incident which you've described as sometime in September with |
| 11 | | the cook, did she ever apologize for her behavior on those two |
| 12 | | days? |
| 13 | A. | Not that I can remember. |

*See* November 6, 2018 Transcript, pg. 190, lines 9 – 13.

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| 8 | Q. | So you felt discipline was appropriate because of |
| 9 | | insubordination? |
| 10 | A. | Yes. |
| 11 | Q. | You felt discipline was appropriate because of her conduct |
| 12 | | in the restaurant itself? |
| 13 | A. | Yes. |
| 14 | Q. | Did you consider her past record of discipline? |
| 15 | A. | I took that in consideration. |

*See* November 6, 2018 Transcript, pg. 215, lines 8 – 15.

manager (Denise Bachand) in front of other employees and guests. This incident preceded the interview of Rodriguez, which is discussed further below. *See* Exhibit RX6.

- On October 24, 2015, Rodriguez received another written warning for failing to bring a guest issue to a manager's attention. *See* Exhibit RX5.

- On June 15, 2015, Rodriguez failed to follow procedure by not claiming tips as required by law. The warning confirms that this was the second warning Rodriguez received for failing to properly claim tips. *See* Exhibits RX3 and RX4.

- On October 24, 2014, Rodriguez was written up for not following procedure in addressing a guest issue, failing to notify a manager about the issue. *See* Exhibit RX1.

- On November 2, 2014, Rodriguez was written up for not following procedure in placing an order for a customer who had a food allergy, failing to notify a manager about the allergy. *See* Exhibit RX2.

- On December 10, 2014, Rodriguez was written up for insubordination for making grits after she was expressly informed, following her request to be able to make grits, that she was not permitted to perform this function. *See* Exhibit RX6.

### A. THE SEPTEMBER 18, 2017 INCIDENT

On September 18, 2017, Rodriguez was involved in an incident with a cook that was the result of her knowing and intentional failure to follow Chip's' policy, the result of which was a confrontation during which Rodriguez yelled at the cook in front of and observable to customers and co-workers. *See* Exhibit GCX10, September 19, 2017 E-mail ("After that me and Carlitos exchange (sic) a few words.").[5] As to the knowing and intentional nature of her failure, Rodriguez admitted that she failed to follow the policy requiring customer orders to be typed into the

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| 1 | Q | And did you complain to him when he quote/unquote didn't |
| 2 | | get it going because of a piece of paper as opposed to the |
| 3 | | computer? |
| 4 | A | Yes. |

November 5, 2018 Transcript, pg. 164, lines 1 – 4.

computer. *See* Exhibit GCX10, September 19, 2017 E-mail ("I understand that's the proper way to do this . . . Granted I should of (sic) put the food the right way in the first place and maybe this whole situation could of (sic) been avoid it (sic)"). Notably, the e-mail in which Rodriguez admits her conduct was sent by her to George Chatzopoulos, the owner of Chip's. Mr. Chatzopoulos, did discuss the incident with Rodriguez, and has confirmed he learned that Rodriguez yelled at the cook during the confrontation. Further, as noted below, Mr. Chatzopoulos attempted to discuss this incident with Rodriguez during the interview that followed the October 2, 2017 incident (during which Rodriguez yelled at the assistant manager); he did so in order to give Rodriguez an opportunity to acknowledge her insubordinate, hostile and highly disruptive workplace behavior.[6] Rodriguez failed to acknowledge the nature of her conduct, or that it was becoming a pattern that was negatively affecting Chip's' business; instead, Rodriguez attempted to justify her violation of Chip's' policies and procedure based upon her view of what was appropriate.[7]

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[6] Rodriguez testified that she did not raise her voice while confronting the cook. *See* November 5, 2018 Transcript, pg. 165, lines 1 – 2. However, this testimony conflicts with the fact that she also testified that it was "steady" on that day and that "[t] here was noise . . . the people that were there, people asking for the food, the music and the intercom." *See* November 5, 2018 Transcript, pg. 162, lines 4 – 16. The confrontation Rodriguez initiated was in front of or observable to customers and co-workers.

[7]

| | | |
|---|---|---|
| 18 | | Was there a work rule at issue in that issue in September? |
| 19 | A. | Yes. |
| 20 | Q. | And what was the work rule? |
| 21 | A. | Just regarding how items were entered into the computer as |
| 22 | | well as the kitchen understanding they make what gets sent |
| 23 | | through the computer, not just things that servers ask them to |
| 24 | | make. |
| 25 | Q. | Okay. So is it appropriate for a server to like ask the |
| 1 | | computer and hand the cook a piece of paper? |
| 2 | A. | No. |
| 3 | Q. | And did you tell Ms. Rodriguez that in the interview that |
| 4 | | you had on October 5th? |

### B. THE OCTOBER 2, 2017 INCIDENT

On October 2, 2017, Rodriguez yelled at an assistant manager, also in front of and observable to customers and co-workers. On that date, Ms. Robertson received a telephone call from Ms. Olden, who was employed as an Assistant Manager at the Wethersfield, Connecticut location of the restaurant. Ms. Olden informed Ms. Robertson that Rodriguez had confronted her about the decision 'cutting' Ms. Bachand from service, which meant that she was no longer taking new tables. Specifically, Ms. Olden stated that Ms. Bachand was not able to begin serving a customer who had just arrived at the restaurant because she had already been "cut" from service.[8] The customer, who had asked to be served by Ms. Bachand, decided to leave the restaurant rather than being served by a different server. However, despite Rodriguez' assertion that her conduct was intended to prevent Chip's from losing a customer, that person continues to be a regular customer.[9]

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5 A. I believe I did.
6 Q. And did she acknowledge that she was wrong?
7 A. I think that she did in that email, but she said she still
8 needed to do it.

November 6, 2018 Transcript, pg. 189, lines 19 - 25; pg. 190, lines 1 - 8.

[8]

5 BY MR. RYAN:
6 Q. You probably don't remember because you've been on the
7 stand for a long time, but you used the phrase if a server is
8 still on to one of General Counsel's question. Is a server is
9 still on if they've already been cut?
10 A. They're on as far as being on the clock, clocked in, but
11 they're not on as far as taking new tables.

November 6, 2018 Transcript, pg. 251, lines 5 – 11.

[9]

4 Q. And I believe you had also testified earlier that Denise's
5 ex-husband was a regular customer of the restaurant?

With regard to the incident, Rodriguez' confronted Ms. Olden on the server line, which is located by the food window of the restaurant (where food is moved from the kitchen to be picked up for delivery by servers). Rodriguez' conduct in confronting Ms. Olden was clearly in front of or observable to customers and co-workers. During the incident, Rodriguez falsely accused Ms. Olden of turning away a customer and suggested that, in her opinion, Mr. Chatzopoulos would never have turned away a customer. *See* November 5, 2018 Transcript, pg. 92, lines 20 – 22. Rodriguez, who had gotten loud such that customers and co-workers were able to hear the confrontation, began yelling at Ms. Olden and shouted that she was a bad manager.[10,11] At this point, Ms. Olden removed herself from the situation and made the telephone call to Ms. Robertson. *See* November 16, 2018 Transcript, pg. 228, lines 23 – 25; pg. 229, line 1.

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6 A. Yes.
7 Q. And had -- I'm sorry, I'm getting ahead of myself. Did
8 you finish?
9 A. I was just saying yes and he still is.

November 6, 2018 Transcript, pg. 249, lines 4 – 9.

[10] Despite Rodriguez' denials, Ms. Olden and Ms. Bachand (on whose behalf Rodriguez was allegedly arguing) both confirmed that Rodriguez was yelling at Ms. Olden. In this regard, Ms. Robertson testified about the statements made during the investigation by Ms. Olden and Ms. Bachand as follows:

19 Q. Santasha [Olden] was there and she's the one who told you what [Rodriguez]
20 was doing?
21 A. She did, Denise did as well.
22 Q. Denise told you that [Rodriguez] was yelling?
23 A. Yes.

*See* November 16, 2018 Transcript, pg. 214, lines 19 – 23.

[11] On October 2, 2017, contemporaneous with the incident, Ms. Olden informed Ms. Robertson that the confrontation had gotten "very loud." *See* November 16, 2018 Transcript, pg. 228, lines 23 – 25; pg. 229, lines 1 – 2.

As noted above, Ms. Olden explained the situation to Ms. Robertson, who advised Ms. Olden to write up the incident but not to aggravate the situation any further because customers were still in the restaurant. Ms. Robertson then instructed Ms. Olden to talk with Rodriguez at the end of Rodriguez' shift; Ms. Olden did speak to Rodriguez as directed, but Rodriguez refused to speak with Ms. Olden or sign the write up before leaving the restaurant. *See* Exhibit RX6. After this occurred, Ms. Olden called and spoke with Anthony Cuozzo, the Chief Operating Officer of Chip's. *See* November 6, 2018 Transcript, pg. 254, lines 23 – 24.

Ms. Robertson and Mr. Cuozzo spoke about this situation. The decision was made to remove both Rodriguez and Ms. Bachand from the schedule until the matter could be investigated further. On October 5, 2017, both Rodriguez and Ms. Bachand were interviewed.

### C. THE OCTOBER 5, 2017 INTERVIEW

During the October 5, 2017, Ms. Bachand confirmed Ms. Olden's description of the October 2, 2017 incident. Specifically, Ms. Bachand stated to Ms. Robertson that she had begun to ask Ms. Olden why she could not serve the customer when Rodriguez began yelling at Ms. Olden. *See* November 6, 2018 Transcript, pg. 214, lines 19 – 23.

During her October 5, 2017 interview, Rodriguez was provided with the opportunity to

explain the incident and to make any complaints she believed were relevant and material.[12,13] Even Rodriguez conceded this fact.[14] In fact, Rodriguez testified that she ". . . went **over the *whole***

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| 7 | Q. | And do you believe that Ms. Rodriguez was given a free |
| 8 | | opportunity to speak her mind? |
| 9 | A. | Oh, absolutely, absolutely. |
| 10 | Q. | And why do you say that? |
| 11 | A. | I made it perfectly clear that I was there just to hear |
| 12 | | her side of the story and not pass any judgment at that time, |
| 13 | | that I would, after hearing her side of the story, I would |
| 14 | | speak to all the people who were involved with the argument and |
| 15 | | I would review the things from the individuals and then we |
| 16 | | would make a decision. |

November 6, 2018 Transcript, pg. 256, lines 7 – 16.

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| 25 | Q. | Okay. Did she make a statement about what had happened in |
| 1 | | September with a cook? |
| 2 | A. | She -- I recall her bringing up several incidents with |
| 3 | | regards to the Assistant manager at that location, that she had |
| 4 | | a personality conflict with. There was an issue with a cook, |
| 5 | | there was an issue with another waitress, there was a litany of |
| 6 | | things that were not necessarily contemporaneous with what I |
| 7 | | was trying to find out that day. |
| 8 | Q. | But you let her speak her mind? |
| 9 | A. | Sure. |
| 10 | Q. | Do you recall how long the meeting was? |
| 11 | A. | I couldn't say exactly, but at least -- I would say at |
| 12 | | least 30 minutes, maybe even longer. |

November 6, 2018 Transcript, pg. 256, line 25; pg. 257, lines 1 - 12.

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| 9 | Q | But my question goes to the -- did any one of those three |
| 10 | | people say we've had enough, you've got to stop talking, you |
| 11 | | can't raise that issue, any words to that effect? |
| 12 | A | During the meeting? |
| 13 | Q | Yes. |
| 14 | A | No. |

November 5, 2018 Transcript, pg. 158, lines 9 - 14.

**situation with Santosha** . . .” November 5, 2018 Transcript, pg. 159, lines 1, 10 – 12. Notably, Rodriguez never mentioned the words ‘age discrimination’ during the interview.[15] In fact, as Rodriguez testified, the interview concerned her individual gripes concerning the unwillingness of the cook to violate Chip’s’ ordering policy (which forms the basis for Rodriguez’ belief that the cook was to blame) and the unwillingness of Ms. Olden to violate Chip’s’ ‘cutting’ policy and procedure (which was the basis for Rodriguez’ belief that Olden was ‘mistreated’).[16] As noted, Rodriguez acknowledged that despite having been given the opportunity during the interview to address any issue she believed important, but there was no mention any alleged age discrimination against Ms. Bachand.[17] Incredibly, Rodriguez did not even mention age discrimination in the e-

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[15] *See* November 6, 2018 Transcript, pg. 186, line 25; pg. 187, lines 1 – 6. *See also* November 6, 2018 Transcript, pg. 256, lines 7 – 24. *See also* November 6, 2018 Transcript, pg. 276, lines 22 – 25.

[16]

13 . . . I was trying to
14 follow company policies [by ‘giving the pickle’] and I was also preventing a manager to
15 continue to mistreat one of my co-workers.

November 5, 2018 Transcript, pg. 125, lines 13 - 15.

[17] Ms. Robertson testified that Rodriguez did not complain about discrimination against Ms. Bachand.

25 Q. Did she ever, at any point in time in that interview, use

1 the words age discrimination?
2 A. No.
3 Q. Did she say anything along those lines that could be
4 interpreted to mean that she was voicing concerns about some
5 sort of discrimination against Ms. Bachand?
6 A. No.

November 6, 2018 Transcript, pg. 186, line 25; pg. 187, lines 1 – 6.

mail which preceded the interview.[18] Mr. Cuozzo likewise confirmed that Rodriguez made personal complaints and did not make any allegation of age discrimination involving Ms. Bachand.[19,20]

Mr. Chatzopoulos also attended the October 5, 2017 interview.[21,22] Mr. Chatzopoulos

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|---|---|---|
| 3 | Q | This email GC-5 does not let anybody know that you were |
| 4 | | complaining on behalf of others about Santosha Olden, correct? |
| 5 | A | Correct. |

November 5, 2018 Transcript, pg. 128, lines 3 – 5.

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| | | |
|---|---|---|
| 17 | Q. | Who did most of the speaking in that interview? |
| 18 | A. | I'd ask some simple questions, but Ms. Rodriguez basically |
| 19 | | told her story. |
| 20 | Q. | Did she use the words age discrimination? |
| 21 | A. | That wasn't -- no, not that I can recall. That wasn't a |
| 22 | | part of our investigation at all. |
| 23 | Q. | Did she use those words? |
| 24 | A. | No, sir. |

November 6, 2018 Transcript, pg. 256, lines 7 – 24.

[20] Mr. Chatzopoulos confirmed, in addition to both Ms. Robertson and Mr. Cuozzo, that Rodriguez did not claim that Ms. Olden was engaging in discrimination against Ms. Bachand on the basis of her age. *See* November 6, 2018 Transcript, pg. 276, lines 22 – 25.

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|---|---|---|
| 2 | Q. | Okay. Who was present when she was investigated? |
| 3 | A. | Initially it was me and the manager. |
| 4 | Q. | And then did somebody else enter into the investigation? |
| 5 | A. | Well, during our conversation Mr. Chatzopoulos had come by |
| 6 | | and sat at the table as well. |

November 6, 2018 Transcript, pg. 256, lines 2 – 6.

[22] Rodriguez asserts in her testimony that she wanted Mr. Chatzopolous' sister to attend the meeting. Even if Mr. Chatzopolous' sister was in Chip's management, Rodriguez never informed Chip's of her request and did not make any such request at the October 5, 2017 interview. *See also* November 6, 2018 Transcript, pg. 191, lines 15 - 19.

recognized that Rodriguez was interested in criticizing Ms. Olden rather than addressing her own misconduct. Notably, Mr. Chatzopoulus testified that Rodriguez complained about Ms. Olden's conduct even though she engaged in similar behavior when she was a manager.[23] It was for this reason that Mr. Chatzopoulos tried to explain to Rodriguez what he believed was wrong with her October 2, 2017 conduct, including the fact that yelling at Ms. Olden in front of customers and co-workers was harmful to Chip's' business.[24] Mr. Chatzopoulos then explained to Rodriguez his concern that this incident was similar to the incident occurring two (2) weeks prior, on September 18, 2017, during which she yelled at a cook because he did not violate Chip's' ordering policy and procedure.[25] Notably, Rodriguez admitted that she was aware of this procedure at the time she confronted the cook. *See* Exhibit GCX10, September 19, 2017 E-mail. Rather than accepting Mr. Chatzopoulos comments and acknowledging that her actions during both incidents were improper and contrary to Chip's' business interests, Rodriguez chose instead to focus on her personal opinion of Ms. Olden.[26]

After the interviews, Ms. Robertson considered the comments and reactions of both Ms. Bachand and Rodriguez to the questions being asked about the October 2, 2017 incident, as well

[23] Mr. Chatzopoulos testified about the things Rodriguez complained about, such as Ms. Olden not doing the job correctly, being on the phone, sitting and eating lunch, and being in the office; he also confirmed that Rodriguez engaged in similar behavior when she was a manager. *See* November 6, 2018 Transcript, pg. 289, lines 23 – 25; pg. 290, lines 1 – 4.

[24] Mr. Chatzopoulos likewise confirmed that Rodriguez' conduct regarding the decision to 'cut' Ms. Bachand from service was wrong. *See* November 6, 2018 Transcript, pg. 278, lines 3 – 7.

[25] Mr. Chatzopoulos confirmed that Rodriguez' conduct regarding the placing of the order was improper, and that her failure to follow protocol was not about customer service or 'giving the pickle' as Rodriguez claimed. *See* November 6, 2018 Transcript, pg. 279, lines 6 – 14.

[26] Mr. Chatzopoulos likewise confirmed that Rodriguez did not admit that her behavior was wrong. *See* November 6, 2018 Transcript, pg. 277, lines 21 - 22.

as about prior insubordination incidents. As to Ms. Bachand, Ms. Robertson concluded that she understood that confronting an assistant manager and questioning management in an insubordinate, hostile and highly disruptive was not proper. However, Ms. Robertson also concluded that while Ms. Bachand had initially questioned the assistant manager, it was Rodriguez (and not Ms. Bachand) who had yelled at the assistant manager in front of and observable to customers and co-workers. It was this understanding that led Ms. Robertson to conclude that an additional week suspension was appropriate discipline for Ms. Bachand. As to Rodriguez, Ms. Robertson concluded that she was completely unwilling to acknowledge the wrongfulness of her repeatedly insubordinate and disruptive conduct, which had culminated in her willingness to yell at a cook and then, a mere two (2) weeks later, yell at an assistant manager. This conduct, coupled with Rodriguez' prior disciplinary history, supported Ms. Robertson's additional conclusion that Rodriguez' insubordinate and disruptive behavior in front of and observable to customers and co-workers was becoming a pattern that was negatively affecting Chip's' business. These reasons led Ms. Robertson to ultimately conclude that Rodriguez' discharge was appropriate. Mr. Cuozzo and Mr. Chatzopoulos were informed of these decisions, and communicated their agreement to Ms. Robertson.[27] *See* November 6, 2018 Transcript, pg. 191, lines 4 – 9. Ms. Robertson communicated the discharge decision to Rodriguez on October 8, 2017.

## III. LEGAL STANDARD

### A. BURDEN OF PROOF FOR SECTION 8(A) VIOLATION

The *Eastex* Court explained that ". . . the Board must ensure that the concerted activity is linked in some identifiable way to legitimate employee concerns related to employment matters."

[27] Mr. Chatzopoulos confirmed that he did not make the decision to discharge Rodriguez, but that he concurred with that decision. *See* November 6, 2018 Transcript, pg. 277, lines 9 - 12.

*Can-Am Plumbing, Inc. v. NLRB*, 321 F.3d 145, 148 (DC Cir. 2003) (referencing *Eastex, Inc. v. NLRB*, 437 US 556, 565-68 (1978)). In proving the existence of such a link between 'concerted activity' and a § 8 violation, it is the General Counsel that bears the burden of proof. As the United States Supreme Court has explained,

> . . . the General Counsel carries the burden of proving the elements of an unfair labor practice. Section 10(c) of the Act, 29 U. S. C. § 160(c), expressly directs that violations may be adjudicated only 'upon the preponderance of the testimony' taken by the Board. The Board's rules also state that '[the] Board's attorney has the burden of [proving] violations of Section 8.' 29 CFR § 101.10(b) (1982).

*NLRB v. Transp. Mgmt. Corp.*, 462 U.S. 393, 401 (1983). Therefore, the General Counsel bears the burden of proving ". . . that the employee's protected conduct was a substantial or motivating factor in the adverse action . . . under § 10(c)." *Transp. Mgmt. Corp.*, 462 US at 401. Importantly, even if the General Counsel were to satisfy its burden of proof, ". . . the Board's construction of the statute permits an employer to avoid being adjudicated a violator by showing what his actions would have been regardless of his forbidden motivation . . . [as] an affirmative defense . . ." *Transp. Mgmt. Corp.*, 462 US at 401.

### B. 'CONCERTED ACTIVITY' IS A NECESSARY ELEMENT

As noted above, ". . . the Board must ensure that the concerted activity is linked in some identifiable way to legitimate employee concerns related to employment matters." *Can-Am Plumbing*, 321 F.3d at 148 (referencing *Eastex*, 437 US at 565-68 (1978)). The Board has acknowledged its obligation to prove such a link, explaining that "the concertedness element . . . [is] analyzed under an objective standard. . . . [which] focuses on whether there is a ***link between*** the activity and matters concerning the workplace or employees' interests as employees." *Fresh & Easy Neighborhood Market, Inc.*, 2014 NLRB LEXIS 627, *11 – 12 (August 11, 2014) (emphasis added).

While it is possible that the action of a single employee can be deemed concerted, that action must be legally sufficient to justify such a conclusion. As the United States Supreme Court has explained, an individual's activity can be considered 'concerted' only where the activity is authorized as a form of group action.

> The term 'concerted [activity]' is not defined in the Act but it clearly enough embraces the activities of employees who have joined together in order to achieve common goals. *See*, e. g., *Meyers Industries, Inc.*, 268 N. L. R. B. 493, 494-495 (1984). What is not self-evident from the language of the Act, however, and what we must elucidate, is the precise manner in which particular **actions of an individual employee *must be linked* to the actions of fellow employees** in order to permit it to be said that the individual is engaged in concerted activity.

*NLRB v. City Disposal Sys., Inc.*, 465 US 822, 830 (1984). In other words, the employee must act in concert with fellow employees or there is no factual basis to support a concertedness finding. *See NLRB v. Peter Cailler Kohler Swiss Chocolates Co.*, 130 F.2d 503 (2d Cir. 1942).[28]

The concertedness concept has been expanded to include the activity of an individual employee *only* if that individual employee acts pursuant to (or to enforce) a collective bargaining agreement. This is because the existence of the collective bargaining agreement provides the basis upon which to find that the employee's action was authorized by the 'collective' and, as such, constitutes joint employee action within the meaning of the Act. The Board decision in *Omni Commercial Lighting, Inc.*, 2016 NLRB LEXIS 534, 364 NLRB No. 54 (NLRB July 19, 2016) provides an example of such 'concertedness.'

> The Board in *Meyers II* stated: 'It is protection for joint employee action that lies at the heart of the Act,' and the Board must distinguish 'between an employee's activities engaged in 'with or on the authority of other employees' (concerted) and an employee's activities engaged in 'solely by and on behalf of the employee

[28] As the *Peter Cailler* Court observed, "[w]hen all the other workmen in a shop make common cause with a fellow workman over his separate grievance, and go out on strike in his support [of that individual workman], they engage in a 'concerted activity' for 'mutual aid or protection,' although the aggrieved workman is the only one of them who has any immediate stake in the outcome." *Peter Cailler*, 130 F.2d at 505-06.

himself' (not concerted).' 281 NLRB at 883, 885 (quoting *Meyers I*, 268 NLRB at 497). Under the *Interboro* doctrine, when an employee acts to enforce a collectively bargained right, the employee may be acting alone in that moment, but his or her actions are considered an extension of the concerted activities that produced the agreement. Such activity is materially different from the acts of a single individual who, like Hopkins, does not invoke or rely on any collectively bargained right grounded in his or her CBA. As the Supreme Court explained in its decision approving the *Interboro* doctrine:

> The invocation of a right rooted in a collective-bargaining agreement is unquestionably an integral part of the process that gave rise to the agreement. That process – beginning with the organization of a union, continuing into the negotiation of a collective-bargaining agreement, and extending through the enforcement of the agreement – is a single, collective activity. Obviously, an employee could not invoke a right grounded in a collective-bargaining agreement were it not for the prior negotiating activities of his fellow employees. Nor would it make sense for a union to negotiate a collective-bargaining agreement if individual employees could not invoke the rights thereby created against their employer. Moreover, when an employee invokes a right grounded in the collective-bargaining agreement, he does not stand alone. Instead, he brings to bear on his employer the power and resolve of all his fellow employees. . . . A lone employee's invocation of a right grounded in his collective-bargaining agreement is, therefore, a concerted activity in a very real sense.

*City Disposal*, 465 U.S. at 831-832 (footnote omitted). Here, Hopkins was not invoking his collective-bargaining agreement and the concerted activity behind it. Instead, he was engaging in individual action to improve his, and only his, wages and benefits. There is no tie-in here to 'joint employee action.' *Meyers II*, supra.

*Omni Commercial Lighting*, 2016 NLRB LEXIS at *31-33.[29]

The required factual predicate for finding 'concerted activity' is either actual group activity (as in a group of employees taking action) or individual activity as authorized by the collective (as in an individual employee acting pursuant to a collective bargaining agreement). In this regard, the United States Supreme Court has consistently held that the Act protects the activities of employees

[29] *See also NLRB v. J. Weingarten, Inc.*, 420 US 251, 260-61 (1975) ("The action of an employee in seeking to have the assistance of his union representative at a confrontation with his employer clearly falls within the literal wording of § 7 that '[employees] shall have the right . . . to engage in . . . concerted activities for the purpose of . . . mutual aid or protection.' *Mobil Oil Corp. v. NLRB*, 482 F.2d 842, 847 (CA7 1973).").

which are intended ". . . to improve [their] terms and conditions of employment or otherwise improve ***their lot*** as employees . . ." *Eastex,* 437 U.S. 556, 565 (emphasis added). In other words, the Act "'. . . protect[s] the right of workers ***to act together*** to better their working conditions,' *NLRB v. Washington Aluminum Co.,* 370 U.S. 9, 14 (1962)". *Eastex,* 437 U.S. at 566 – 567 (emphasis added). The Act does not protect an individual employee who simply speaks out about perceived unfairness to another employee. *Eastex,* 437 U.S. at 566 – 567 (emphasis added). Notably, even the NLRB has adopted this rationale, explaining that:

> whether an employee's activity is 'concerted' depends on the manner in which the **employee's *actions may be linked to those [actions]* of his coworkers**. *See NLRB v. City Disposal Systems*, 465 U.S. 822, 831, 104 S. Ct. 1505, 79 L. Ed. 2d 839 (1984).

*Fresh & Easy Neighborhood Market, Inc.*, 2014 NLRB LEXIS at *10 – 11 (emphasis added).

### C. A 'MUTUAL AID AND PROTECTION' FINDING IS A NECESSARY ELEMENT

> In § 1, 29 U. S. C. § 151, the Act declares that it is a goal of national labor policy to protect 'the exercise by workers of full freedom of association, self-organization, and designation of representatives of their own choosing, for the purpose of . . . mutual aid or protection.'

*NLRB v. J. Weingarten, Inc.*, 420 US 251, 261-62 (1975). In explaining the Congressional intent behind the 'mutual aid or protection' element, the Board has held that:

> [t]he concept of 'mutual aid or protection' focuses on the goal of concerted activity; chiefly, whether the employee or employees involved are seeking to 'improve terms and conditions of employment or otherwise ***improve their lot as employees***.' *Eastex, Inc. v. NLRB*, 437 U.S. 556, 565, 98 S. Ct. 2505, 57 L. Ed. 2d 428 (1978).

*Fresh & Easy Neighborhood Market,* 2014 NLRB LEXIS at *10 – 11 (emphasis added). In assessing this goal, ". . . the 'mutual aid or protection' element [is] analyzed under an objective standard. . . . [which] focuses on whether there is a link between the activity and matters concerning the workplace or employees' interests as employees." *Fresh & Easy Neighborhood Market,* 2014 NLRB LEXIS at *11 – 12 (emphasis added).

### D. 'CONCERTEDNESS' AND 'MUTUAL AID AND PROTECTION' ARE RELATED

The Board has provided guidance on the dual requirements of engaging in 'concerted activity' for the purpose of 'mutual aid and protection.' As the Board has explained:

> [t]o be protected under Section 7 of the Act, employee conduct must be ***both*** 'concerted' ***and*** engaged in for the purpose of 'mutual aid or protection.' Although these elements are closely related, our precedent makes clear that they are analytically distinct. . . . As described more fully below, whether an employee's activity is 'concerted' depends on the manner in which the employee's actions may be linked to those of his coworkers. *See NLRB v. City Disposal Systems*, 465 U.S. 822, 831, 104 S. Ct. 1505, 79 L. Ed. 2d 839 (1984) . . . The concept of 'mutual aid or protection' focuses on the goal of concerted activity; chiefly, whether the employee or employees involved are seeking to 'improve terms and conditions of employment or otherwise ***improve their lot as employees***.' *Eastex, Inc. v. NLRB*, 437 U.S. 556, 565, 98 S. Ct. 2505, 57 L. Ed. 2d 428 (1978).

*Fresh & Easy Neighborhood Market*, 2014 NLRB LEXIS at *10 – 11 (August 11, 2014) (emphasis added). The Board further explained that "both the concertedness element and the 'mutual aid or protection' element are analyzed under an objective standard. . . . [which] focuses on whether there is a ***link between*** the activity and matters concerning the workplace or employees' interests as employees." *Fresh & Easy Neighborhood Market*, 2014 NLRB LEXIS at *11 – 12 (emphasis added). In other words, in order for the activities of the employee to be protected by the Act, there must be a finding that the employee engaged in a 'concerted activity' for the 'mutual aid or protection' of employee *and* a finding that there is a link between the specific 'concerted activity' and the 'mutual aid or protection' that is sought. Or, as the Second Circuit Court of Appeals explained,

> ". . . individual action will be considered 'concerted' because ***sufficient nexus exists*** between the act in question and collective action. For example, a lone act is concerted if it stems from prior 'concerted activit[y]' or if an individual acts, formally or informally, on behalf of a group. *See*, e.g., Every Woman's Place, Inc., 282 NLRB No. 48 (Dec. 11, 1986), enf'd, Every Woman's Place v. NLRB, 833 F.2d 1012 (6th Cir. 1987) (unpublished decision available on WESTLAW); Consumers Power Co., 282 N.L.R.B. No. 24 (Nov. 13, 1986) (individual safety complaint concerted because it was previously discussed at group meeting).

*Ewing v. NLRB*, 861 F.2d 353, 361 (2d Cir. 1988).

## IV. ARGUMENT

This issue before the Administrative Law Judge (hereinafter, the "ALJ") is whether § 8(a) the Act protects an individual employee from discharge when it is claimed that the employee has engaged in 'concerted activity' for 'mutual aid and protection' within the meaning of § 7 of the Act. Importantly, "[t]he Act protects only 'concerted activities.'" *NLRB v. Northern Metal Co.*, 440 F.2d 881, 884 (3d Cir. 1971).[30] In deciding this issue, the Board must recognize that the Act simultaneously protects the rights of employers to discipline employees for workplace misconduct. As the United States Supreme Court affirmed:

> Section 10(c) of the Act does authorize an employer to discharge employees for 'cause' and our cases have long recognized this right on the part of an employer. But this, of course, cannot mean that an employer is at liberty to punish a man by discharging him for engaging in concerted activities which § 7 of the Act protects.

*NLRB v. Wash. Aluminum Co.*, 370 U.S. 9, 16-17, 82 S. Ct. 1099, 1104 (1962).[31]

In determining whether a discharge violates the Act, as is claimed in the instant matter, the ALJ must first find that the employee engaged in 'concerted activities' for the purpose of collective bargaining or for the purpose of '*other* mutual aid or protection.' As is commonly accepted,

> Section 8(a)(1) of the Act makes it unlawful for an employer 'to interfere with, restrain, or coerce employees in the exercise of rights guaranteed' by section 7 of the Act. 29 U.S.C. § 158(a)(1). Section 7, in turn, protects the rights of employees to engage in union organization and 'other concerted activities for the purpose of collective bargaining or other mutual aid or protection….' 29 U.S.C. § 157. In

[30] In *Northern Metals*, the Court explained that "[t]he primary question presented by this case is whether a single employee acting alone is engaged in protected concerted activity when he presses demands for holiday pay, to which he deems himself entitled under the provisions of a collective bargaining agreement."

[31] Rodriguez was an employee at will, which means that the discharge decision need not generally require a 'for cause' determination.

> defining the scope of protected activity, the Board ***must ensure*** that the concerted activity ***is linked*** in some identifiable way to legitimate employee concerns related to employment matters. *Eastex, Inc. v. NLRB*, 437 U.S. 556, 565-68, 57 L. Ed. 2d 428, 98 S. Ct. 2505 (1978).

*Can-Am Plumbing*, 321 F.3d at 148 (emphasis added).[32] The ALJ must then find that the discharge is pretextual in that the employer disciplined the employee as retaliation for invoking the Act.[33] As will be discussed below, Rodriguez fails to establish that Chip's violated § 8 of the Act because she engaged in a 'concerted activity,' or 'concerted activity' that is *linked to* 'mutual aid or protection' which sought to ". . . improve terms and conditions of employment or otherwise ***improve their lot as employees***." *Eastex,* 437 U.S. at 565 (emphasis added).

### A. THE AMENDED CHARGE ALLEGATION MUST BE DISMISSED AS UNTIMELY

The Act is clear that the Board may not issue a complaint for conduct occurring more than six (6) months before filing and service of the charge. With regard to the instant *Complaint,* this six (6) month period begins to run on the date that Rodriguez received actual (or constructive) notice of the allegedly unfair labor practice alleged in the May 24, 2018 charge. Based upon the undisputed facts, the *Complaint* alleges conduct from the amended charge that occurred *only* on

[32] Because the instant matter does not involve collective bargaining, the issue for the Board to decide is whether Rodriguez engaged in, within the meaning of the Act, ". . . concerted activities for the purpose of . . . other mutual aid and protection . . . ." *Northern Metal Co.*, 440 F.2d at 884.

[33] As will be discussed herein, "[w]hen the General Counsel . . . files a complaint alleging that an employee was discharged because of his union activities, the employer may assert legitimate motives for his decision. In *Wright Line*, 251 N.L.R.B. 1083 (1980), enforced, 662 F.2d 899 (CA1 1981), cert. denied 455 U.S. 989, 102 S.Ct. 1612, 71 L.Ed.2d 848 (1982), . . . [i]t [was] determined that the General Counsel carried the burden of persuading the Board that an anti-union animus contributed to the employer's decision to discharge an employee, a burden that does not shift, but that the employer, even if it failed to meet or neutralize the General Counsel's showing, could avoid the finding that it violated the statute by demonstrating by a preponderance of the evidence that the worker would have been fired even if he had not been involved with the Union." *NLRB v. Transportation Management Corp.*, 462 U.S. 393, 394 (1983).

October 4, 2017.[34] *Complaint*, § 6. In other words, Rodriguez received actual notice of the allegedly unfair practice alleged in § 6 of the *Complaint* on October 4, 2017.

The six (6) month limitations period applicable to the October 4, 2017 e-mail expired on April 4, 2018. The new charge, having been filed on May 24, 2018 (and served on May 25, 2018) is indisputably untimely. As a result, the new charge should be dismissed in favor of Chip's. Further, because the new charge is a legally distinct and independent allegation that does not rely upon (and is not proven by) the same facts as the initial charge, it cannot relate back to the time of the filing of the initial charge. Specifically, the new May 24, 2018 charge (which alleges that Mr. Cuozzo's October 4, 2017 e-mail was intended to prevent employees from speaking to each other about work-related incidents)[35] is distinct from the initial charge (which alleges only individualized retaliation in that ". . . [Chip's] terminated employee, Jacqueline Rodriguez, for engaging in protected activities by speaking up in defense ***of a co-worker***.")[36]. The factually distinct and independent May 24, 2018 charge does not relate back to the factually distinct and independent April 2, 2018 charge, and it should therefore be dismissed in favor of Chip's.

### B. RODRIGUEZ DID NOT ENGAGE IN 'CONCERTED ACTIVITY'

[34] The sole allegation of the amended charge is that Chip's, by Anthony Cuozzo, "restricted employees from discussing work-related incidents with other employees" when he stated in an October 4, 2017 e-mail sent to Rodriguez that she should not "engage in idol [sic] chatter and gossip regarding the [October 2, 2017] incident . . . [and that she] should [not] be discussing conversations the management team may or may not have had with other employees, unless [she is] witness to the conversations personally." Exhibit A to the Amended Charge, October 4, 2017 E-mail from Anthony Cuozzo.

[35] This was recited Rodriguez' May 24, 2018 charge in the *Complaint* as follows: "About October 4, 2017, Respondent, by Cuozzo, in writing, prohibited employees from discussing work-related incidents with other employees." *Complaint*, § 6.

[36] This was recited in the *Complaint* as follows: "About October 8, 2017, Respondent discharged Rodriguez." *Complaint*, § 8.

The conduct which resulted in the decision to discharge Rodriguez is not 'concerted activity' for 'mutual aid or protection.' In other words, it cannot be rationally determined that the alleged actions constitute a ". . . ***link between*** the activity [of Rodriguez] and matters concerning the workplace or employees' interests as employees" within the meaning of the Act. *Fresh & Easy Neighborhood Market*, 2014 NLRB LEXIS at *11 – 12 (emphasis added). Notably, in *Fresh & Easy Neighborhood Market*, the link was found because "Elias sought her coworkers' assistance in raising a sexual harassment complaint to management, by soliciting three of them to sign the piece of paper . . . [which she believed could] 'prove' the harassment to which she had been selected." *Fresh & Easy Neighborhood Market*, 2014 NLRB LEXIS at *14. The allegedly concerted activity in the instant matter involves the claim that Ms. Bachand was the victim of age discrimination. However, unlike *Fresh & Easy Neighborhood Market*, Rodriguez elicited no statement regarding age discrimination and elicited support for her alleged attempt 'prove' the age discrimination. In fact, as noted above, the one document which was apparently created by more than one employee does not identify age discrimination but instead generically asserts that "[Ms. Olden h]as ***something*** against Denise." *See* Exhibit GCX3, Notes (emphasis added)." Further, Rodriguez has made no claim that she made any request for co-worker assistance, and the General Counsel put forth no evidence to support such a claim.[37]

In yelling at Ms. Olden, a supervisory employee, in front of co-workers and customers, Rodriguez was clearly not invoking the Act's purpose of "'. . . protecting the right of workers ***to act together*** to better their working conditions,' NLRB v. Washington Aluminum Co., 370 U.S.

[37] Rodriguez testified that the list was created at the request of Mr. Chatzopoulos.

9, 14 (1962)".[38] *Eastex*, 437 US at 566 – 567 (emphasis added). And, as noted above, Rodriguez never claimed that Ms. Olden engaged in age discrimination as a result of the decision – made by Ms. Robertson – to 'cut' Ms. Bachand from service.[39] Additionally, Rodriguez never asserts (and cannot truthfully claim) that she confronted Ms. Olden on October 2, 2017 'with or on the authority of other employees' *See City Disposal*, 465 U.S. at 831. Therefore, the only reasonable conclusion is that Rodriguez' conduct concerning that incident was individual in nature and that Rodriguez was not 'acting together with workers to better their working conditions' within the meaning of the Act. Rather, Rodriguez was expressing personal disdain for the decision to not allow Ms. Bachand to serve a new table after having been 'cut' from service *despite* Chip's' policy and procedure regarding the 'cutting' of servers from service.[40]

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[38] Rodriguez does not dispute that she confronted Ms. Olden about the fact that Ms. Bachand had been 'cut' from service. Rodriguez also does not dispute that she is aware of the procedure.

[39] Ms. Robertson testified on cross-examination as follows:

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|---|---|---|
| 1 | Q. | Okay, but when servers are cut they're typically at work |
| 2 | | for a longer period of time as they finish up their side work, |
| 3 | | right? |
| 4 | A. | Yes, but it varies. It depends on if they still have a |
| 5 | | table or if they still have cleaning to do on their tables. |
| 6 | Q. | Sure. So if they're still serving tables, then they're |
| 7 | | going to be there a little while. That's part of the process |
| 8 | | of cutting a server though, they might -- they typically still |
| 9 | | have tables at the time you cut them? |
| 10 | A. | Yeah, they just don't take any more. |
| 11 | Q. | Right. But when a regular customer comes in and asks to |
| 12 | | sit with a specific server, typically they're going to be |
| 13 | | granted that request, aren't they? |
| 14 | A. | If the server's still on, yes. |

*See* November 6, 2018 Transcript, pg. 195, lines 1 - 14.

[40] Ms. Robertson testified that she made the decision to 'cut' Ms. Olden from service. *See* November 6, 2016 Transcript, pg. 209, lines 5 – 7. Ms. Robertson also testified that she had been training Ms. Olden, and another manager, to follow the 'cut' procedure. *See* November 6, 2018

The September 19, 2017 incident in which Rodriguez yelled at a cook because he would not violate Chip's' policy and procedure (regarding the entry of orders) also does not invoke the Act's purpose of protecting the rights of co-workers to act together.[41] In fact, the incident arose from Rodriguez' singular determination that she could ignore the procedure for entering orders and, upon realizing that the cook did not agree, confront him in the workplace. In addition to there being no evidence to support a 'concerted activity' finding, the closeness in time to the October 2, 2017 incident supports Ms. Robertson's determination that Rodriguez was exhibiting continuing behavior that was contrary to Chip's' business interests.[42] *See* November 5, 2018 Transcript, pgs. 144 – 145. Ms. Robertson also properly considered prior disciplinary incidents in making her decision to discharge Rodriguez. *See* November 5, 2018 Transcript, pg. 215, lines 14 – 15.

It also bears noting that the General Counsel submitted no evidence that servers believed Ms. Olden was engaged in age-based discrimination or that they participated in (or were asked to participate in) Rodriguez' acts with respect to the entry of orders or the 'cutting' policy. Because the General Counsel carries the burden of proving the elements of an unfair labor practice, and because it has failed to provide evidence of 'concerted activity,' it has also failed to satisfy its

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Transcript, pg. 248, lines 18 – 20. The General Counsel produced no contrary evidence regarding the cutting of Ms. Bachand.

[41] Rodriguez does not dispute that she "had words" with the cook because he did not prepare an order that she submitted on paper *rather* than through the authorized computer system.

[42] Even during the hearing Rodriguez attempts to minimize her disregard for Chip's' policies and procedures. With regard to the incident with the grits, she argues that she was not insubordinate because she did not *initially* cook the grits, she just ". . . put them in the microwave with more water and mixed them . . ." *See* November 5, 2018 Transcript, pg. 145, pgs. 3 – 4. Rather than accept that she violated a policy and procedure (and in this case a directive), she simply asserts that she should be permitted to do as she pleases. Notably, Rodriguez conceded that before she cooked the grits she has been directed – in response to her specific question – not to cook grits. *See* November 5, 2018 Transcript, pg. 145, pgs. 14 – 24.

burden under the Act. *See NLRB v. Transp. Mgmt. Corp.*, 462 U.S. at 401 (1983).

### C. RODRIGUEZ DID NOT ACT FOR 'MUTUAL AID OR PROTECTION'

The Board has held "that 'proof that an employee action inures to the ***benefit of all***' is 'proof that the action comes within the 'mutual aid or protection' clause of Section 7. 281 NLRB at 887.'" *Fresh & Easy Neighborhood Market*, 2014 NLRB LEXIS at *20 (emphasis added). The Board, in so holding, identified the types of cases for which such 'mutual aid or protection' has been found (". . . employees' complaints over supervisory handling of safety issues . . . employees' protest of racially discriminatory hiring practices . . . conversation between two employees . . . where one employee, who had previously complained about offensive comments from a supervisor, urged a second employee to report sexually suggestive comments from same supervisor . . . [and] employee's action in contacting OSHA was protected".) *Fresh & Easy Neighborhood Market*, 2014 NLRB LEXIS at *21 (citations omitted). However, regardless of the context in which the activity arises, these examples establish that there must be an attempt by the employee to band together with his or her co-workers. *See Fresh & Easy Neighborhood Market*, 2014 NLRB LEXIS at *25 ("Although arising in widely varying circumstances, all of those cases are grounded in the 'solidarity' principle."). As will be explained below, there is no such 'solidarity' within the meaning of the Act as to Rodriguez' conduct.

The Board explained that the requirement of 'solidarity,' by which an employee seeks assistance from a co-worker, is integral to finding the presence of 'mutual aid or protection.' In this regard, the Board has held that "[b]y soliciting assistance from coworkers to raise his issues to management, an employee is requesting that his coworkers exercise vigilance against the employer's perceived unjust practices. *See El Gran Combo de Puerto Rico v. NLRB*, 853 F.2d 996, 1005 fn. 4 (1st Cir. 1988), quoting *J. Weingarten*, 420 U.S. at 260-261." *Easy Neighborhood*

*Market*, 2014 NLRB LEXIS at *25 – 26. The Board further affirmed this prerequisite by holding that the requirement of 'mutual aid or protection' is satisfied when an employee seeks the assistance of co-workers. *See Easy Neighborhood Market, Inc.*, 2014 NLRB LEXIS at *31 ("We hold that an employee seeking the assistance or support of his or her coworkers in raising a sexual harassment complaint is acting for the purpose of mutual aid or protection.").

In determining whether employee seeks the assistance or support of co-workers, "[t]he concept of 'mutual aid or protection' focuses on the goal of concerted activity; chiefly, whether the employee or employees involved are seeking to 'improve terms and conditions of employment or otherwise ***improve their lot as employees***.' *Eastex, Inc. v. NLRB*, 437 U.S. 556, 565, 98 S. Ct. 2505, 57 L. Ed. 2d 428 (1978)." *Fresh & Easy Neighborhood Market*, 2014 NLRB LEXIS at *10 – 11 (August 11, 2014) (emphasis added). The instant *Complaint* supports no finding that Rodriguez was engaged in 'concerted activity' that was seeking to improve the employees' lot as employees. As discussed above, the September 19, 2017 incident and the October 2, 2017 incident merely reflect Rodriguez' assessment that she should be able to violate (or have other employees violate) Chip's' policies and procedures at her discretion. Even if it were conceded that Rodriguez' actions were concerted, which they are not, the activities certainly do not support a finding that the goal those activities was to 'improve terms and conditions of employment or otherwise improve their lot as employees' within the meaning of the Act.

First, the September 19, 2017 incident involves the policy and procedure of entering an order in the computer system (rather than handing a paper order to the cook directly). This policy and procedure is not a term and condition of employment, and Rodriguez' challenge to it was not intended to improve the employees' lot as employees. In fact, the only employee to benefit from Rodriguez' attempt to bully the cook was Rodriguez, who would have successfully obtained for

*herself* the privilege on that day of violating Chip's' ordering policy. Further, Rodriguez' confrontation with the cook was not intended to improve the employees' lot as employees with regard to a term and condition of employment, and the General Counsel provided no evidence proving how this allegedly 'concerted activity' ". . . inures to the ***benefit of all***' . . . within the 'mutual aid or protection' clause of Section 7." *Fresh & Easy Neighborhood Market*, 2014 NLRB LEXIS at *20 (emphasis added). Rodriguez' individual conduct, which sprang from her personal decision to confront the cook because she disagreed with his decision, does not support a 'mutual aid or protection' finding.

Second, the October 2, 2017 incident involves Rodriguez' personal decision to confront Ms. Olden about the 'cutting' of Ms. Bachand from service. As discussed above, this policy prevents a server from taking a new table after having been 'cut' from service. As also discussed above, Ms. Robertson both 'cut' Ms. Bachand from service and had been working with managers (including Ms. Olden) to ensure that there was compliance with this policy. Therefore, notwithstanding Rodriguez' factual error in asserting that Ms. Olden discriminated against Ms. Bachand by not allowing her to take a new table, it is clear that the 'cutting' policy and procedure is not a term and condition of employment within the meaning of the Act. Additionally, Rodriguez' confrontation of Ms. Olden was not intended to improve the employees' lot as employees because the only employee to benefit from Rodriguez' attempt to bully Ms. Olden would have been Ms. Bachand (and only on that one occasion), who receded from the confrontation and then conceded that it had been wrong to challenge the decision. Further, Rodriguez' confrontation with Ms. Olden was not intended to improve the employees' lot as employees with regard to a term and condition of employment, and the General Counsel provided no evidence proving how this allegedly 'concerted activity' ". . . inures to the ***benefit of all***' . . . within the 'mutual aid or protection' clause

of Section 7." *Fresh & Easy Neighborhood Market*, 2014 NLRB LEXIS at *20 (emphasis added). Rodriguez' individual conduct, which sprang from her personal decision to confront Ms. Olden about a decision that Ms. Olden did not even make, does not support a 'mutual aid or protection' finding.

Third, Rodriguez' personal attorney, Thomas Durkin, attempts to claim that Chip's admitted in response to her CHRO complaint that Rodriguez complained about age discrimination at the October 2, 2017 meeting. However, Attorney Durkin ignores several critical factors which make this information immaterial to the instant matter. The CHRO complaint itself makes no mention of any collective action, speaking only in terms of Rodriguez' personal activities in allegedly raising this issue. Additionally, three witnesses testified at the hearing that Rodriguez did not raise issues of age discrimination at that October 2, 2017 meeting.[43] Further, Attorney Durkin (and the General Counsel) likewise make too much out of the alleged concession in Chip's' answer to the CHRO complaint by purposefully ignoring other answers which expressly deny Rodriguez' allegations that she complained about age discrimination. *See* Exhibit CP1, CHRO Complaint, ¶ 8 and Exhibit CP2, Verified Answer, ¶ 8. Similarly, they ignore Chip's' denial of Rodriguez' allegation that her discharged was the result of her opposition to Ms. Olden's alleged age discrimination of Ms. Bachand. *See* Exhibit CP1, CHRO Complaint, ¶ 23 and Exhibit CP2, Verified Answer, ¶ 23. Notably, Chip's expressly denies that Ms. Olden made the decision to 'cut' Ms. Bachand from service, which has been affirmed during the course of this matter despite Rodriguez' (incorrect) allegation that Ms. Olden 'cut' her due to an age-based discriminatory intent. *See* Exhibit CP1, CHRO Complaint, ¶ 13 and Exhibit CP2, Verified Answer, ¶ 13.

[43] *See* November 6, 2018 Transcript, pg. 186, line 25; pg. 187, lines 1 – 6. *See also* November 6, 2018 Transcript, pg. 256, lines 7 – 24. *See also* November 6, 2018 Transcript, pg. 276, lines 22 – 25.

There is simply no allegation – and can truthfully be no allegation – that Rodriguez did anything more than confront co-workers (the cook and an Assistant Manager) for the sole purpose of coercing them into violating Chip's' policies and procedures. The "goal" of the allegedly concerted activity was neither to change a 'term or condition of employment' nor an attempt to 'improve the employees' lot as employees' within the meaning of the Act. Because the General Counsel carries the burden of proving the elements of an unfair labor practice, and because it has failed to provide evidence of 'concerted activity,' it has also failed to satisfy its burden under the Act as to whether the conduct satisfies the 'mutual aid or protection' element. *See NLRB v. Transp. Mgmt. Corp.*, 462 U.S. at 401 (1983).

### D. THERE IS AN INSUFFICIENT NEXUS UNDER THE ACT

As discussed above, the Act applies when ". . . [a] ***sufficient nexus exists*** between the act in question and collective action. . . . (individual safety complaint concerted because it was previously discussed at group meeting)." *Ewing v. NLRB*, 861 F.2d at 361 (citations omitted). Rodriguez' acts qualify as neither 'concerted activities' nor acts for 'mutual aid or protection.' However, even if Rodriguez' acts could be deemed 'concerted,' there would simply be an insufficient nexus between her conduct and the allegedly collective action sufficient to support a finding that the Act applies to the instant matter.

The General Counsel introduced a list of issues that servers allegedly had with Ms. Olden. As to this list, Rodriguez testified that Mr. Chatzopoulos asked servers to prepare the list and that another server, Ashley Curtis (who also testified), wrote the list. *See* Exhibit GCX3, Notes. *See also* November 5, 2018 Transcript, pg. 25, lines 7 – 25.[44] *See also* November 5, 2018 Transcript,

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| 13 | A | Yeah. So Joel came to the server aisle and gather us and |
| 14 | | he say, George call, he was very excited that something was |

pg. 26, lines 12 – 13. As Ms. Curtis testified, the first issue on the list pertains to Ms. Olden and Ms. Bachand. That entry states as follows: "[Ms. Bachand h]as ***something*** against Denise." *See* Exhibit GCX3, Notes (emphasis added). *See also* November 5, 2018 Transcript, pg. 26, lines 12 – 13. That 'something' was not explained by Ms. Curtis, although she did state her belief that Ms. Olden was not a good manager. *See* November 5, 2018 Transcript, pg. 36, lines 22 – 23. Rodriguez similarly testified that Ms. Olden was in her opinion not a good manager.[45] Rodriguez then testified, referring to Ms. Bachand, that Ms. Olden was 'singling her out.'[46] Despite this assertion, as noted above, Rodriguez however never claimed during the investigation of the October 2, 2017 incident that Ms. Bachand had been the victim of age discrimination. *See* November 5, 2018 Transcript, pg. 128, lines 3 – 5. *See also* November 6, 2018 Transcript, pg. 256, lines 7 – 24.

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| | | | |
|---|---|---|---|
| | 15 | | being -- was going to be done -- and he say, George call and he |
| | 16 | | say for us servers to make a list and say what the issues were |
| | 17 | | involving Santosha. |
| | 18 | Q | Uh-huh. |
| | 19 | A | And that's when the notes were taken by Ashley when we |
| | 20 | | were all there stating how we felt about Santosha issue with |
| | 21 | | Denise and everyone else. |

November 5, 2018 Transcript, pg. 63, lines 13 – 21.

[45]

| | | | |
|---|---|---|---|
| | 1 | A | Oh, it wasn't good. She -- since the beginning she didn't |
| | 2 | | have a good -- she didn't -- it wasn't good. From the |
| | 3 | | beginning it was a problem. |

November 5, 2018 Transcript, pg. 51, lines 1 – 3.

[46]

| | | | |
|---|---|---|---|
| | 10 | A | But then as she worked more and more she was having issues |
| | 11 | | with other servers. She was creating conflicts, she wasn't |
| | 12 | | doing what was expected as a manager, and she was also singling |
| | 13 | | out Denise, she was treating her different than she treat the |
| | 14 | | other servers. |

November 25, 2018 Transcript, pg. 52, lines 10 – 14.

Further, and fatal to Rodriguez' claim that Ms. Bachand had been singled out as is being alleged, is Rodriguez' testimony that the servers (at least who participated in the meeting) were upset that Ms. Olden ". . . treated employees so bad . . . "[47] Notably, Rodriguez then complained that Ms. Bachand "will cry in the middle of her shift . . . [and] we would have to go take care of her guests . . ."[48] So, in effect, Rodriguez testified that Ms. Olden treated all the servers badly, coupled with the belief perhaps that Ms. Olden treated Ms. Bachand worse, but that the servers were upset that they had to cover for Ms. Bachand because she became more upset than the other servers. There is no express claim that the other servers believed that Ms. Olden was the victim of age discrimination, or that they authorized Rodriguez to confront Ms. Olden concerning this claim. In fact, the express claim is that the servers (who were present at the meeting) authorized a list of issues to be given to 'management' and that a conversation with would follow.[49]

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47

22 A That was written by Ashley, but that was the main thing,
23 that was the thing that bothered everyone the most, because we
24 never had a manager that treated employees so bad . . .

November 5, 2018 Transcript, pg. 65, lines 13 – 25; pg. 66, lines 1 – 3.

48

22 A That was written by Ashley, but that was the main thing,
23 that was the thing that bothered everyone the most, because we
24 never had a manager that treated employees so bad, especially
25 her, she was like 60 years old, she had heart conditions, and

1 she will cry in the middle of her shift and she couldn't -- we
2 have to go take care of her guest because she became very
3 agitated.

November 5, 2018 Transcript, pg. 65, lines 13 – 25; pg. 66, lines 1 – 3.

49

1. THE WITNESS: Just as a list compiled between myself,
2 Ms. Rodriguez, and whoever else was on shift that day. We were
3 under the impression that this was going to be given to

Based upon this testimony, and the non-specific claim in the list as to Ms. Olden's issues with Ms. Bachand, there is no rational basis upon which to find that Ms. Olden *singled out* Ms. Bachand because of intentional discrimination based upon her age, if at all, and further no evidence whatsoever that Chip's tolerated, approved of or otherwise discriminated against Ms. Olden on the basis of her age. Additionally, there is also no rational basis upon which to find that there is a nexus between the drafting of list and Rodriguez' confrontation of either the cook or Ms. Olden.

### E. CHIP'S DID NOT VIOLATE SECTION 8(A)(1) OF THE ACT

Section 8(a)(1) of the Act provides that "[i]t shall be an unfair labor practice for an employer . . . to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 157 of this title . . ." This is the exact claim made by the Board, wherein it asserts that ". . . the conduct [of Chip's] described . . . in paragraphs 6, 8 and 9 [of the *Complaint*] . . . interfer[ed] with, restrain[ed], and coerc[ed] its employees in the exercise of the rights guaranteed in Section 7 of the Act in violation of Section 8(a)(1) of the Act." *Complaint*, § 10. Specifically, the Board asserts that Chip's violated Section 8 of the Act: (a) on ". . . October 4, 2017 . . . [by] ***prohibit[ing] employees*** from discussing work-related incidents with other employees"; and (b) on ". . . October 8, 2017 . . . [by] ***discharg[ing] Rodriguez*** . . . for "criticizing Olden's management style and her treatment of a coworker". *Complaint*, §§ 6, 7 and 9 (emphasis added). The Board also asserts that the discharge of Rodriguez was intended ". . . to discourage employees from engaging in these or other protected concerted activities." *Complaint*, § 9.

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4 management or someone else who would be spoken to about these
5 matters, because I guess we didn't feel as if we were being
6 heard about these issues.

November 5, 2017 Transcript, pg. 33, lines 1 - 6.

In determining whether there is a § 8 violation, the Board must determine whether Ms. Rodriguez was invoking a right pursuant to § 7 of the Act. As is clear, §7 of the Act guarantees that employees shall have:

> . . . the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 158(a)(3) of this title.

The only § 7 right potentially applicable to Rodriguez' conduct is the right ". . . to engage in other concerted activities for the purpose of . . . other mutual aid or protection . . ." Section 7 of the Act.[50] It is necessary to find that Rodriguez engaged in protected activities before determining whether Chip's violated § 8(a) of the Act.

Though not a termination matter, the Board in *Easy Neighborhood Market* is instructive because it involved a situation where an employee had *both* engaged in 'concerted activity' and acted for the purpose of 'mutual aid or protection but, as the Board determined, the employer *did not* violate § 8(a) of the Act. In its opinion, the Board affirmed that ". . . employers have a legitimate business interest in investigating facially valid complaints of employee misconduct . . . *See Consolidated Diesel Co.*, 332 NLRB 1019, 1020 (2000), enfd. 263 F.3d 345 (4th Cir. 2001)." *Easy Neighborhood Market*, 2014 NLRB LEXIS at *38. The employer in *Easy Neighborhood Market* did not violate Act for this reason.

[50] Neither the *Complaint* nor the April 2, 2017 charge makes an allegation regarding self-organization; forming, joining or assisting labor organizations; or engaging in other concerted activities for the purpose of collective bargaining. Similarly, neither the *Complaint* nor the May 24, 2018 charge makes an allegation regarding self-organization; forming, joining or assisting labor organizations; or engaging in other concerted activities for the purpose of collective bargaining.

As discussed above, Chip's investigated the incident involving Rodriguez and Ms. Olden, considered Rodriguez' prior history of insubordinate and disruptive behavior and determined that Rodriguez' discharge was appropriate. Chip's had a reasonable basis to discipline Rodriguez for demanding the violation of Chip's' policies and procedures on both September 19, 2017 and October 2, 2017, followed by her confrontation of the co-workers that would not accede to her demands. As the Board has long held, an employer does not violate the Act by discharging an employee – even a pro-union employee – when that employee's bickering and dissension interferes with production. *See Stuart F. Cooper Co.*, 136 N.L.R.B. 142 (1962). *See also Boaz Spinning Co. v. NLRB*, 395 F.2d 512 (5th Cir. 1968). The instant matter presents a situation where the decision to discharge Rodriguez was similarly justified.

It has long been held by the courts and by the NLRB that employees may not engage in concerted activities in disregard of an employer's legitimate business interests, which include the undisputed right to maintain discipline in the workplace.

> Under Section 7 of the National Labor Relations Act, 29 U.S.C. § 157, employees have the right 'to engage in . . . concerted activities for their mutual aid and protection.' But this right cannot be exercised without regard to the employer's undisputed right to maintain discipline in its establishment. See *Republic Aviation Corp. v. N.L.R.B.*, 324 U.S. 793, 89 L. Ed. 1372, 65 S. Ct. 982 (1945).

*J. P. Stevens & Co. v. NLRB*, 547 F.2d 792, 794 (September 17, 1976). Stated another way,

> '[t]he discharge of an employee for wrongful conduct is an inherent power of management and one that is protected by law. . . . So long as the action is not based upon opposition to union activities . . . 'If an employee is both inefficient [insubordinate] and engaged in union activities, that is a coincidence that does not destroy the just cause for his discharge.'' (Brackets in original). (citations omitted).

*Boaz Spinning Co. v. NLRB*, 395 F.2d 512, 516 (5th Cir.1968).

The evidence, discussed above, establishes that Rodriguez repeatedly engaged in insubordinate and disruptive behavior affecting Chip's' legitimate business interests. The evidence

also establishes that when provided with the opportunity to acknowledge her repeatedly insubordinate and disruptive behavior, Rodriguez chose to instead to point out issues she had with Ms. Olden and to otherwise justify her refusal to abide by Chip's' policies and procedures. Chip's' management, including Ms. Robertson, Mr. Chatzopoulos and Mr. Cuozzo, recognized that the discharge of Rodriguez was appropriate, and that decision was supported by the record. There is no evidence to support the apparent assertion that Chip's' decision was pretextual, especially as Rodriguez continued to justify her decisions to violate Chip's' policies and procedures during the investigation and even at the hearing.[51]

The General Counsel separately argues that Mr. Cuozzo's attempt to maintain the integrity of the investigation violated § 8(a) of the Act. As is clear, Mr. Cuozzo contacted Rodriguez and asked her not to engage in 'idle chatter or gossip' regarding the incident that was being investigated. There was no attempt to stifle Rodriguez in any attempt she might have made to obtain the aid of her co-workers or to discuss any other term or condition of employment. In fact, Rodriguez made no such allegation in either the initial charge or in the amended charge.

As noted above, Chip's had a legitimate business interest in investigating the October 2, 2017 incident. Consequently, Chip's had an unequivocal right to investigate the incident and, in relation to that investigation, ensure its integrity. The correspondence from Mr. Cuozzo is a narrowly tailored attempt to ensure that the investigation was thorough, impartial and fair. In this regard, it is notable that the investigation itself does not form the basis of the *Complaint*.

[51] As noted above, Rodriguez even continued to justify at the hearing her decision to violate a direct order not to prepare grits. Rodriguez is simply not interested in following any Chip's' policy or procedure with which she personally disagrees.

Under similar circumstances, the NLRB in *Easy Neighborhood Market* explained the lawfulness of a narrowly tailored limitation on an employee's exercise of Section 7 rights. As the NLRB explained,

> . . . as part of her investigation into Elias' sexual harassment complaint, Jackson instructed Elias not to obtain additional statements from her coworkers in connection with that complaint. Jackson's instruction to Elias was narrowly tailored to address the Respondent's need to conduct an impartial and thorough investigation. Elias was specifically told that, in relation to the investigation, she should let Jackson obtain any additional statements. Jackson did not prohibit Elias from discussing the pending investigation with her coworkers, asking them to be witnesses for her, bringing subsequent complaints, or obtaining statements from coworkers in future complaints. . . . Jackson's instruction would reasonably be viewed as seeking to safeguard the integrity of the investigation, not restrict[ing] Elias in the exercise of her Section 7 rights.

*Easy Neighborhood Market*, 2014 NLRB LEXIS at *38 – 39. Without conceding that Rodriguez actually exercised any Section 7 rights, the following reasoning applies to the instant matter.

Mr. Cuozzo similarly asked Rodriguez not to engage in 'idle chatter and gossip.' The e-mail from Mr. Cuozzo did not prohibit Ms. Rodriguez from asking her co-workers to be witnesses during the investigation or from otherwise discussing the pending investigation with her co-workers. Additionally, Mr. Cuozzo did not make any statements in the e-mail that could be reasonably interpreted as attempting to prevent Rodriguez from bringing a complaint or obtaining statements from co-workers for future complaints. Further, the correspondence does not seek generally to warn the Complainant against (or threaten discipline for) speaking to co-workers about

employment related matters.[52] An objective view of the e-mail merely cautioned Rodriguez from engaging in idle chatter and gossip.

In support of this position, it is clear that Mr. Cuozzo specifically referenced the investigation and not 'terms and conditions' of employment generally. *See* Exhibit GCX7, October 4, 2017 E-mail ("Please allow the process to continue and allow Laura to conduct her inquiry."). Ms. Cuozzo also made it clear that he was not prohibiting Rodriguez from speaking about matters of which she was personally aware (instead hoping to avoid 'idle chatter,' 'gossip' and 'speculation'). *See* Exhibit GCX7, October 4, 2017 E-mail. In this regard, Mr. Cuozzo expressly recognized that Rodriguez could discuss ". . . conversations with the management team . . . [where she was] witness to the conversations personally." *See* Exhibit GCX7, October 4, 2017 E-mail from Anthony Cuozzo. That correspondence, reviewed objectively as required by the Act, does not stifle Rodriguez' rights under § 7 of the Act. Further, the General Counsel has provided neither an objectively rational interpretation of the e-mail nor any supportive evidence to justify the allegation that Chip's has ". . . interfer[ed] with, restrain[ed], and coerc[ed] its employees in the exercise of the rights guaranteed in Section 7 of the Act . . . " "'to engage in . . . concerted activities for their mutual aid and protection.'" *Complaint*, ¶ 10; *J. P. Stevens & Co. v. NLRB*, 547 F.2d 792, 794 (September 17, 1976).

[52] The following warning was held by the NLRB to violate Section 8(a)(1) of the Act because it was not narrowly tailored to an incident. As the NLRB explained, "[u]nder 'corrective actions required,' the document states, among other things, that 'all work related problems are to be discussed with the Supervisor. There are no exceptions to this corrective action.' The document concludes with the warning: 'Any further activity that results in a counter-productive work situation will be dealt with in the form of disciplinary action, up to and including discharge of employment.'" *SKD Jonesville Division L.P. and Pamela J. Cole*, 340 N.L.R.B. 101, *103 (September 10, 2003). Mr. Cuozzo's correspondence is entirely distinguishable.

Chip's did not violate Section 8(a)(1) of the Act by investigating the October 2, 2017 incident and by making the decision, following the October 5, 2017 interview, to discharge Rodriguez.

## V. CONCLUSION

For all of the foregoing reasons, the *Complaint* against Chip's must be dismissed.

CHIP'S WETHERSFIELD, LLC D/B/A
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## CERTIFICATION

I hereby certify that a copy of the above *Post-Hearing Brief of Chip's Wethersfield, LLC* was filed with the National Labor Relations Board using its 'NLRB E-File' system, and I also hereby certify and that the brief was thereafter served by mail or electronically on this 18th day of January 2019, to all parties or counsel of record as follows:

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